

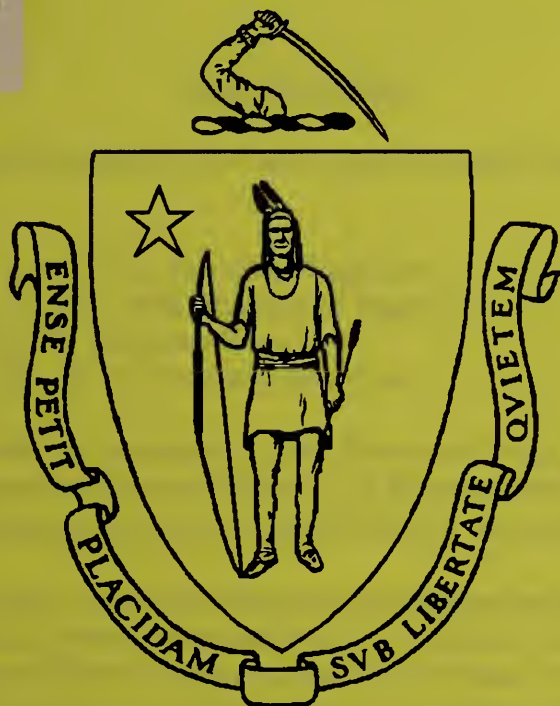
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FAIR LABOR AND BUSINESS PRACTICES DIVISION

An Advisory on The Amendments to the Wage Enforcement Laws

November 2, 1998

ADVISORY 98/2

An Advisory from the Attorney General's Fair Labor and Business Practices Division on the Amendments to the Wage Enforcement Laws

Pursuant to G.L. c. 23, § 1(b), the Office of the Attorney General issues the following Advisory:

INTRODUCTION

The following wage laws recently have been amended by the General Court (St. 1998, c. 236):

G.L. c. 149, § 26 - 27H: Prevailing Wage Law
G.L. c. 149, §§ 148 - 148B: Payment of Wage Law
G.L. c. 151, § 19: Minimum Wage Law
G.L. c. 151, §§ 1B, 19: Overtime Wage Law

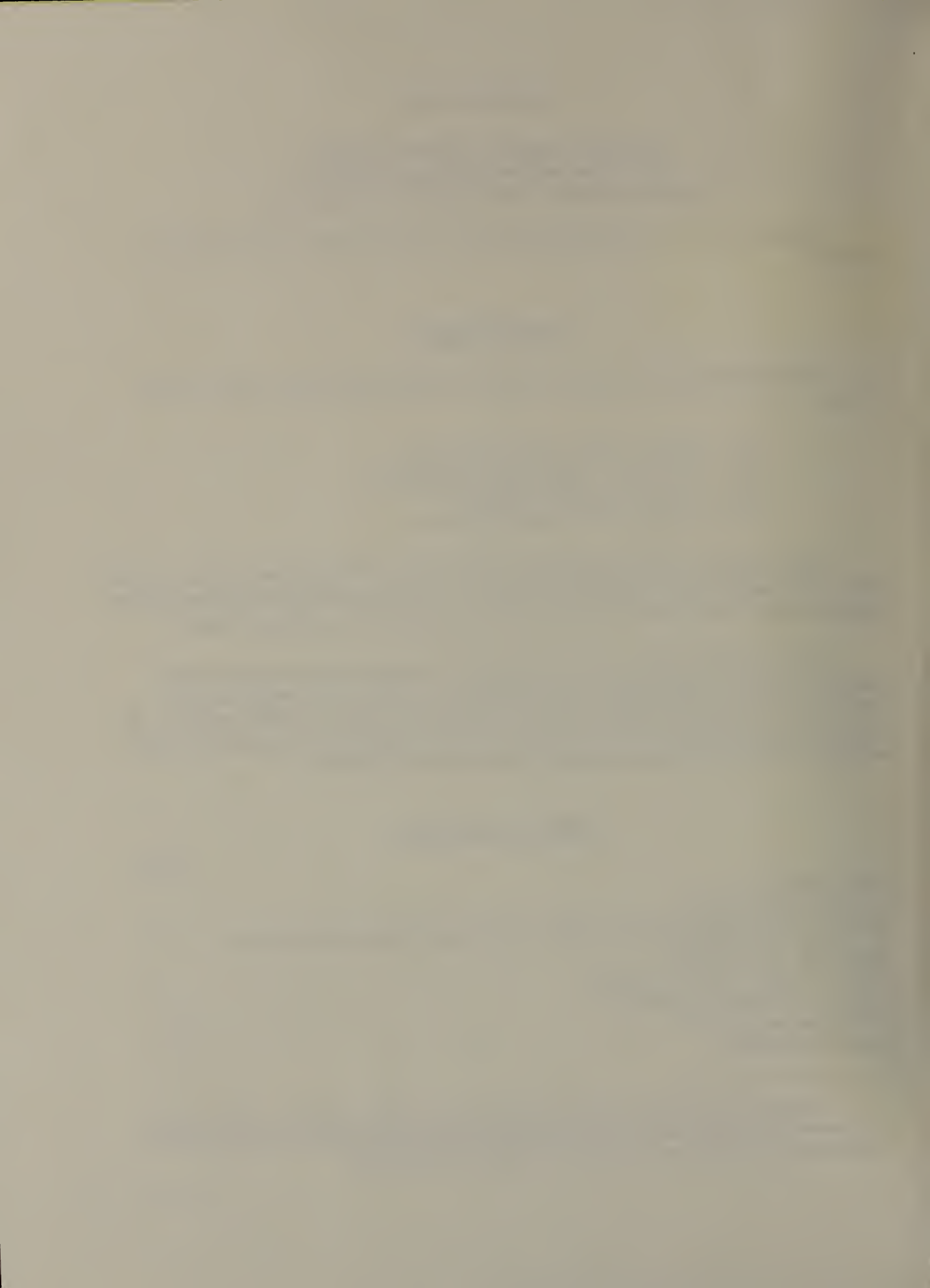
On November 5, 1998, the amendments to the Payment of Wage, Minimum Wage, Overtime Wage and Prevailing Wage statutes become effective. To the extent that the amendments apply to publicly-bid public works projects, they do not become effective for an additional 90 days.¹

The amendments create a new civil enforcement mechanism and an expanded array of available remedies for various types of wage and hour law violations. The criminal penalty provisions also have been modified to increase substantially the range of available penalties. The Attorney General intends to continue to exercise these now-expanded wage enforcement powers judiciously and fairly based upon the applicable law and facts of each case.

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¹If the bid opening date for a public works project occurs prior to February 4, 1999, violations that occur on such a project can only be prosecuted criminally and the employer is subject to only the penalties that were in effect prior to the effective date of the amendments.



STATUTES AMENDED

The following provisions of the Massachusetts General Laws have been amended to provide for an enhanced range of available criminal penalties and to provide the Attorney General with the authority to enforce the applicable wage laws through a new civil administrative process:

- G.L. c. 149, § 26, which sets forth the criteria for determining the prevailing wage rate;
- G.L. c. 149, § 27, which provides requirements for the payment of the prevailing wage rate or rates on public works construction projects;
- G.L. c. 149, § 27B, which sets forth the requirements for employee and payroll records that must be kept by contractors and subcontractors engaged in public works construction;
- G.L. c. 149, § 27C, which enumerates the penalties and sanctions for the violation of certain wage and hour laws, as well as the civil citation and appeals process;
- G.L. c. 149, § 27F, which provides requirements for the payment of the prevailing wage rate or rates to operators of rental equipment;
- G.L. c. 149, § 27G, which sets forth the requirements for the payment of the prevailing wage rate or rates for moving contractors;
- G.L. c. 149, § 27H, which sets forth the requirements for the payment of the prevailing wage rate or rates for maintenance or cleaning contractors who contract with the Commonwealth;
- G.L. c. 149, § 148, which requires the timely payment of wages;
- G.L. c. 149, § 148A, which provides for the protection of employees asserting rights under the provisions of chapter 149;
- G.L. c. 149, § 148B, which establishes a presumption of employment;
- G.L. c. 151, § 1B, which requires the payment of overtime compensation; and
- G.L. c. 151, § 19, which provides penalties for the following violations:
 - § 19(1), which provides for the protection of employees complaining about violations of chapter 151;
 - § 19(2), which provides penalties for paying less than the minimum wage;

- § 19(3), which provides penalties for paying less than \$1.60 per hour to employees in agriculture and farming;
- § 19(4), which provides penalties for falsifying records, for failing to provide records to and/or for hindering or delaying inspection by the Attorney General; and
- § 19(5), which provides penalties for requesting or requiring an employee to return all or a portion of his or her wages, and/or for threatening, coercing or intimidating an employee in order to induce the employee to accept less than the wages due.

THE NEW PENALTY STRUCTURE

The amendments to G.L. c. 149, § 27C, have resulted in an enhanced range of penalties for criminal violations of G.L. c. 149, §§ 26-27H (the "Prevailing Wage Law"), c. 149, §§ 148 and 148B (the "Payment of Wages Law") and c. 151, §§ 1A, 1B and 19 (the "Minimum Wage Law") (collectively referred to as the "Wage and Hour Laws"). There are more serious penalties for violations which are willful or intentional.²

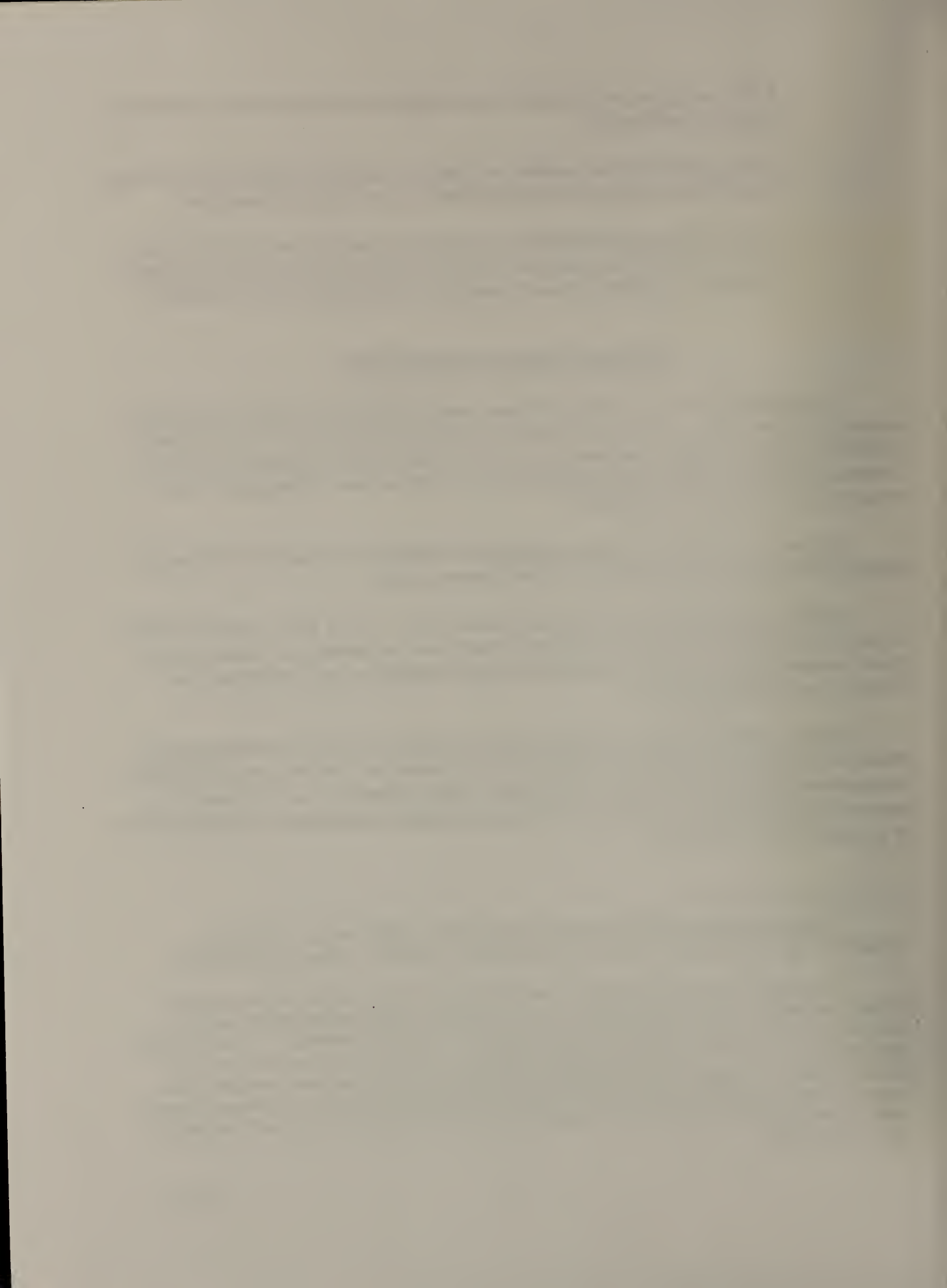
Employers³ who violate these laws now also face alternative civil penalties which may be imposed by the Attorney General through an administrative process.

In addition, the Anti-Retaliation Provision found in G.L. c. 149, § 148A, has been amended to include severe penalties where an employer penalizes his or her employee for making a wage-related complaint or cooperating in a wage enforcement investigation. See "Anti-Retaliation Provision" section, below, at p. 11.

The law continues to offer an employee a right to institute a private civil action against an employer for violations of the Wage and Hour Laws at the expiration of 90 days after the filing of a complaint with the Attorney General, or sooner if the Attorney General assents in writing. If an employee prevails in his or her lawsuit, he or she can be awarded treble damages and attorneys' fees by the court. G.L. c. 149, § 150.

²Willful and intentional conduct are nearly synonymous. Willful conduct is defined as intentional rather than accidental. See e.g., *Commonwealth v. Armand*, 411 Mass. 167, 170 (1991).

³An employer can take many forms. It can be corporate or non-corporate, private or public. Where a corporation is concerned, an employer is the corporation, "[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation...." G.L. c. 149, §§ 27 and 148; G.L. c. 151, § 19. Where non-corporate, an employer is either a sole proprietor, a general partner, trustee, or a designated agent having the management of the organization or company. With regard to public employment, the employer is "the public officer whose duty it is to pay money, approve, audit or verify pay rolls, or perform any other official act relative to payment of any public employees." G.L. c. 149, § 148.



As in the past, the Attorney General, where appropriate and unless circumstances dictate otherwise, will give employers an opportunity to respond to an employee's complaint before taking civil or criminal action.

I. Criminal Penalties

A. Sentences for Violation of Any Wage and Hour Law

Where a court finds an employer guilty of violating any of the above-referenced Wage and Hour Laws *without willful intent* to do so, the employer faces the following criminal penalties:

	<u>First Offense</u>	<u>Subsequent Offense</u>
Fine	up to \$10,000	up to \$25,000
Jail	up to 6 months	up to 1 year

G.L. c. 149, § 27C(a)(2).

Where a court finds an employer guilty of *willfully* violating any of the above-referenced Wage and Hour Laws, the employer faces the following criminal penalties:

	<u>First Offense</u>	<u>Subsequent Offense</u>
Fine	up to \$25,000	up to \$50,000
Jail	up to 1 year	up to 2 years

G.L. c. 149, § 27C(a)(1).

B. Debarment Resulting from a Criminal Violation of the Prevailing Wage Laws

In addition to fines and jail, the law provides for debarment from public works construction, as follows:

<u>Debarment Resulting from a Criminal Conviction</u>		
	<u>First Offense</u>	<u>Subsequent Offenses</u>
Violation without intent:	6-month debarment	3-year debarment
Willful violation:	5-year debarment	5-year debarment

G.L. c. 149, § 27C(a)(3).

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The debarment provisions are more fully set forth in the "Summary of Debarment Provisions" section, below, at p. 11.

II. Civil Penalties

A. Civil Citation

The Attorney General may now issue a civil citation or written warning to an employer for each violation⁴ of the Wage and Hour Laws. A citation may require that:

1. the infraction be rectified--i.e., mandating that the employer fully comply with the Wage and Hour Laws; and/or
2. restitution be paid to the employee or employees; and/or
3. a civil penalty⁵ be paid to the Commonwealth.

G.L. c. 149, § 27C(b)(2).

Where an employer is found to have *unintentionally* violated the law, the available civil penalty is as follows:

<u>First Offense</u>	<u>Subsequent Offense</u>
up to \$7,500 in total	up to \$25,000 per violation

G.L. c. 149, § 27C(b)(2).

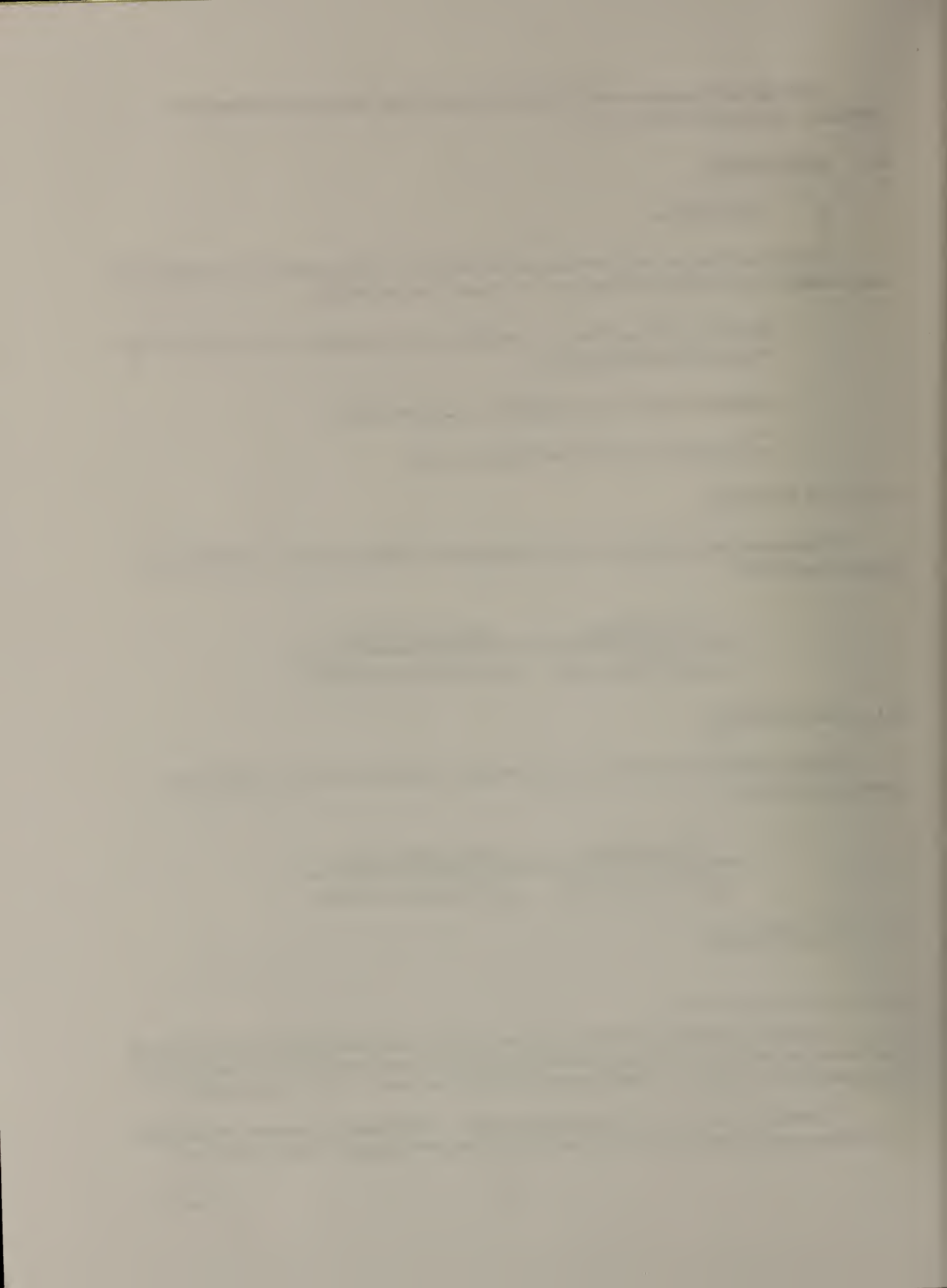
Where an employer is found to have *intentionally* violated the law, the available civil penalty is as follows:

<u>First Offense</u>	<u>Subsequent Offense</u>
up to \$15,000 in total	up to \$25,000 per violation

G.L. c. 149, § 27C(b)(2).

⁴The statute states that "each failure to pay an employee the appropriate rate or prevailing rate of pay for any pay period may be deemed a separate violation, and the pay period shall be a minimum of 40 hours unless such employee has worked fewer than 40 hours that week." G.L. c. 149, § 27C(b)(1).

⁵The factors that the Attorney General will consider in determining the amount of an appropriate civil penalty are discussed in the "Determining Civil Enforcement Sanctions" section, below, at p. 8.



The employer has a statutory right to an administrative appeal of a civil citation issued by the Attorney General.⁶ An employer who does not appeal a citation must comply with the requirements set forth therein within 21 calendar days of the date the citation was issued.⁷

B. Debarment Resulting from a Civil Violation of the Prevailing Wage Law

In addition to fines, the law provides for debarment from public works construction as follows:

Debarment Resulting from Issuance of Civil Citation

Three citations for the intentional violation of the prevailing wage law issued on three different occasions: ⁸	3-year debarment (from the date of issuance of the third citation)
Failure to comply with the requirements set forth in a citation or DALA order:	1-year debarment (from the date of issuance of the citation or order)

G.L. c. 149, § 27C(b)(3).

The debarment provisions are more fully set forth in the “Summary of Debarment Provisions” section, below, at p. 11.

C. Additional Sanctions for a Civil Violation of the Prevailing Wage Law

1. Order to File a Bond⁹

In addition to issuing a civil citation for a violation of the Prevailing Wage Law, the Attorney General also may order that the employer provide “a bond in an amount necessary to rectify the infraction and to ensure compliance with [the Prevailing Wage Law], and with other provisions of law” The bond is to be filed with the Attorney General and conditioned upon the

⁶The process for citation and appeal therefrom are more fully set forth in the “Appeal from a Civil Citation” section, below, at p. 9.

⁷The law provides additional sanctions where an employer fails to comply with a civil citation. See “Failure to Comply with a Civil Citation” section, below, at p. 9.

⁸An “occasion” is defined as the date of issuance of a citation by the Attorney General.

⁹Note that there is different bond provision in G.L. c. 149, § 27 (the “Penal Bond Provision”). Pursuant to Penal Bond Provision, the Attorney General may conduct a hearing and order a penal bond which the employer must file in order to proceed with work. This decision is appealable to the Superior Court.

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payment of the prevailing wage rate or rates that were established for the specific public works project upon which the contractor's or subcontractor's employees are working. G.L. c. 149, § 27C(b)(3).

2. Cessation of Work

If an employer fails to comply with the requirements set forth in an issued civil citation, the Attorney General may order the cessation of all of the work, or of the portion of the work being performed by the violating contractor or subcontractor, on the project site where the violation was discovered. G.L. c. 149, § 27C(b)(3).

FACTORS THE ATTORNEY GENERAL WILL CONSIDER IN DETERMINING THE METHOD OF ENFORCEMENT

I. Determining Course of Action

All alleged violations will be investigated *before* the Attorney General decides whether to proceed, if at all, with a criminal prosecution or a civil enforcement action. The following criteria, among others, may be considered in determining whether the Attorney General will proceed with a criminal or civil action:

- Did the employer have actual knowledge of the alleged violation?
- Did the employer deceive or defraud its employees or others during the course of, or in connection with, the alleged violation?
- Has the employer previously violated the Wage and Hour Laws?
- Has the employer violated other related state or federal statutes (e.g., failure to pay required unemployment taxes or workers compensation premiums)?¹⁰
- Has the employer previously been convicted of larceny, fraud or a similar offense?
- Is there other evidence of the employer's exploitation of its employees?
- Has the employer retaliated against its employees for reporting an alleged violation?

¹⁰Employers are urged to contact the Department of Employment and Training and the Department of Industrial Accidents to inquire about employers' obligations under Massachusetts General Laws Chapters 151A and 152. The Attorney General will refer violations of these and other laws to the appropriate authorities for further investigation and retains the right to enforce these statutes, whether independently or as part of a wage enforcement action, where appropriate.

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REPORT OF THE
COMMISSIONER OF THE
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FOR THE YEAR 1904

ANNUAL REPORT OF THE COMMISSIONER OF THE BUREAU OF CHEMISTRY FOR THE YEAR 1904

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DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
CHICAGO, ILL., 1905

Published by the
UNIVERSITY OF CHICAGO PRESS
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CHICAGO, ILL.
1905

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- Has the employer violated the statutes that authorize the Attorney General to inspect the workplace and examine employment or certified payroll records?
- Was there a single alleged violation or multiple violations?
- Has the employer made any restitution payments to its employees?
- Did the employer fail or refuse to comply with a civil citation?

The facts and circumstances of each individual case will dictate the weight and importance which will be accorded to each of these factors. In addition, the Attorney General will determine if the violation was willful or intentional based upon an assessment of the facts and the law.

II. Determining Civil Enforcement Sanctions

If the Attorney General substantiates an alleged wage violation after an investigation and chooses to exercise his civil enforcement authority by issuing a citation, the following standards will apply in determining the appropriate civil sanctions to be imposed:

1. A written order to comply with the Wage and Hour laws will be issued in every case, absent extraordinary circumstances.
2. A written order of full restitution will be issued in every case, unless the employee already has recovered the total wages owed.
3. Penalties will be assessed based on an evaluation of the facts and circumstances of the particular case.

As required by law, the Attorney General will take into account the following factors in determining the penalty imposed pursuant to a citation:

- a. previous violations of the Wage and Hour Laws by the employer;
- b. the employer's intent to violate the Wage and Hour Laws;
- c. the number of employees affected by the violation(s);
- d. the monetary extent of the violation(s); and
- e. where there is a violation of the Prevailing Wage Law, the total amount of the public works contract or the amount of the payroll.

Willful or intentional violations will result in more severe sanctions. Escalating penalties and sanctions will be imposed for each subsequent offense.

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APPEAL FROM A CIVIL CITATION

I. Appeal Process

An employer who has received a civil citation or order may appeal to the Division of Administrative Law Appeals ("DALA"). The employer must file a notice of appeal with the Attorney General and DALA within *10 days* of receipt of the citation. G.L. c. 149, § 27C(b)(4). The employer should send this notice by certified mail or other verifiable method. *See* 801 CMR 1.01(4).

An employer appealing a citation or order will be granted a hearing before DALA in accordance with the provisions of G.L. c. 30A and 801 CMR 1.00 *et seq.* After the hearing, DALA may affirm the citation, vacate the citation or modify the citation. G.L. c. 149, § 27C(b)(4).

An employer who is aggrieved by DALA's decision may petition for a rehearing before DALA or appeal to the Superior Court pursuant to G.L. c. 30A, § 14. The time periods for these filings are set forth in G.L. c. 30A, § 14(1).

II. Effect of Appeal on Penalties

In Prevailing Wage matters, a DALA decision to debar or suspend a contractor does not take effect until 30 days after issuance of the DALA order. The contractor cannot *bid* on any new contracts during that 30-day period unless the Superior Court temporarily enjoins the order of debarment or suspension. G.L. c. 149, § 27C(b)(5). However, the contractor may complete any ongoing work and may execute any new contract that was awarded based upon a bid submitted prior to DALA's finding.

The time for payment of any civil penalty and restitution is stayed until 30 days after DALA renders its decision on the appeal. If a further appeal is taken, the 30-day period is stayed pending judicial review of DALA's decision. G.L. c. 149, § 27C(b)(6).

FAILURE TO COMPLY WITH A CIVIL CITATION

An employer who fails to comply with a civil citation after the period of appeal has expired, or after all avenues of appeal are exhausted, is subject to a mandatory lien and, in the case of a prevailing wage law violation, a mandatory debarment, and may face criminal prosecution and/or a stop-work order.

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I. Liens against Real Property and Personal Property

Any delinquent civil penalty payment will result in a lien being placed upon the real estate and personal property of the employer who fails to pay that penalty. The lien will be imposed if an assessed penalty is not paid in full:

- (a) *within 21 days* from the issuance of the citation; or
- (b) where the citation is appealed to DALA, *within 30 days* after DALA's decision (excluding any period of judicial review).

G.L. c. 129, § 27C(b)(7).

The lien will be in the amount of the outstanding unpaid portion of the assessed civil penalty plus interest thereon at the rate of 18% per annum. The lien will be considered a tax due and owing to the Commonwealth and may be collected through the procedures provided for by G.L. c. 62C.

The lien upon real estate and personal property of any person who fails to pay any civil penalty imposed by citation shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until and unless notice thereof has been recorded or filed and indexed in the registry of deeds or land registration office of the county or district where such real estate is situated. *See* G.L. c. 62C, § 50(b). In the case of registered land, the lien is not valid until and unless noted on the certificate of title of the owner. In the case of personal property, the lien is not valid until and unless filed in the office in which a security or financing statement or notice would ordinarily be filed. Any notice of lien shall contain the name of the obligor and his or her address, taxpayer identification number or social security number, and the amount of the outstanding civil penalty imposed. *See* G.L. c. 149, § 27C(b)(7).

II. Debarment

If a contractor or subcontractor is cited for violation(s) of the prevailing wage law(s), and absent an appeal or after an unsuccessful appeal, fails to comply with the requirements set forth in the civil citation or order, the contractor or subcontractor will be debarred for *one year* from the date of issuance of such citation or order. G.L. c. 149, § 27C(b)(3).

III. Criminal Prosecution

The Attorney General may seek a criminal complaint against an employer if the employer fails to comply with a citation and/or pay the civil penalty or restitution within *21 days* from the date the citation was issued, unless the employer appeals the citation. G.L. c. 149, § 27C(b)(6).

Where DALA affirms or modifies a citation, and the employer does not comply with the affirmed or modified citation *within 30 days* after DALA's decision, the Attorney General may seek

a criminal complaint. If a further appeal is taken, the 30-day period is stayed pending judicial review of DALA's decision. G.L. c. 149, § 27C(b)(6).

IV. Cessation of Work

If an employer fails to comply with the requirements set forth in an issued civil citation, the Attorney General may order the cessation of all of the work, or of the portion of the work being performed by the violating contractor or subcontractor, on the project site where the violation was discovered. G.L. c. 149, § 27C(b)(3).

SUMMARY OF DEBARMENT PROVISIONS

A contractor or subcontractor may be debarred from public works construction under both the civil and criminal penalty provisions of the amended statute. When a contractor or subcontractor is debarred s/he is "prohibited from contracting, directly or indirectly, with the [C]ommonwealth or any of its agencies, authorities or political subdivisions for the construction of any public building or other public works or from performing any work on the same as a contractor or subcontractor" G.L. c. 149, § 27C(a)(3).

The scope of a debarment has been expanded by the new amendments to include a debarment of "all affiliates of the contractor or subcontractor, as well as any successor company or corporation that [the] attorney general, upon investigation, determines to not have a true independent existence apart from that of the violating contractor or subcontractor." G.L. c. 149, § 27C(b)(3).

If a contractor or subcontractor enters into a public works contract or works on a public works project during the period of his or her debarment, the Attorney General has the authority to commence an action in the Superior Court:

1. to enjoin the awarding of a contract to the violating contractor or subcontractor; or
2. to void a contract that has been wrongfully awarded; or
3. to obtain a cease and desist order on any ongoing work being performed in violation of the debarment order.

G.L. c. 149, § 27C(a)(3).

ANTI-RETALIATION PROVISION

General Laws c. 149, § 148A, always has required that "[n]o employee shall be penalized by an employer in any way as a result of any action on the part of the employee to seek his or her rights

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under the wage and hour provisions of [chapter 149].” However, the penalty for a violation of this law has been substantially increased under the new amendments. An employer who violates this provision now faces a potential fine of up to \$50,000 and 6 months in jail if the employer “discharges or in any other manner discriminates against any employee because [that] employee has made a complaint to the attorney general or any other person, or assists the attorney general in any investigation under [chapter 149], or has testified or is about to testify in any such proceedings.”

STATUTES OF LIMITATIONS

Each separate wage and hour statute contains a statute of limitations for the civil administrative remedies: three years for violations of the Prevailing Wage and Payment of Wages Laws and two years for violations of the Minimum Wage and Overtime Laws. The statutes of limitations for criminal prosecutions remain at 6 years from the date of offense for prevailing wage and payment of wage violations and at 2 years from the date of offense for overtime and minimum wage violations. However, under the discovery rule found in *Bowen v. Eli Lilly & Co., Inc.*, 408 Mass. 204, 205 (1990), the statute of limitations does not begin to run until the employee discovers or reasonably should have discovered that s/he has been harmed.

